Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–128 0F 2002

NIK HASHIM, AUGUSTINE PAUL JJCA AND ZAINUN ALI J

1 OCTOBER 2003

Civil Procedure *— Judgment and orders — Judgment in default — Setting aside — Applications made more than 30 days after receipt of judgment in default — No reasons advanced by applicants for delay in making applications — No prayers for extensions of time to make applications — Whether applications should be dismissed in limine without considering merits of the applications — Rules of the High Court 1980 O 42 r 13*

Civil Procedure *— Service — Substituted service — Challenge to validity of substituted service order made in application to set aside judgment in default — Whether such challenge amounted to a non-permitted collateral attack — Whether challenge to validity of substituted service order ought to be made in separate proceedings*

The appellants (defendants) appealed to the Court of Appeal against the decision of the High Court judge who in reversing the decision of the senior assistant registrar, dismissed the appellants' applications to set aside a judgment in default ('JID') entered against them by the respondents. The record revealed that the first and third appellants filed their applications two months out of time whereas the second appellant was out of time by seven months. There was also nothing irregular with the JID. The appellants' counsel admitted that the applications were out of time but contended that their case had merits which justified the setting aside of the JID. The appellants raised other issues such as: (i) non-service of the writ; (ii) time bar; (iii) matter was fully settled; and (iv) failure of consideration.

Held, affirming the decision of the High Court judge and dismissing the appeal with costs:

(1) The appellants' applications did not comply with O 42 r 13 of the Rules of the High Court 1980 which requires that a party intending to set aside a judgment must make his application to the court and serve it on the party who obtained the judgment within 30 days after the receipt of the judgment by him. On the facts, the first and third appellants were two months out of time whereas the second appellant was out of time by seven months. There was no explanation whatsoever from the appellants for their delay in approaching the court and they had also not prayed for extension of time to make their applications. Thus there was clearly no need for the merits of the appellants' applications to be considered and the applications should in fact be dismissed in limine (see p 651B–D).

(2) The service of the writ on the appellants was pursuant to an order for substituted service, resort to which was due to the appellants' changes of addresses without informing the respondent. The

respondent had complied with the order for substituted service and the appellants could not challenge the order in their applications for that would amount to a collateral attack on the validity of process which is not permitted. The validity of the order for substituted service could only be challenged by proceedings instituted for that very purpose (see p 651H–I); *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 followed.

(3) The appellants' contention on the action being time barred was misconceived. The appellants' liability was founded on a 'demand' guarantee and indemnity. Demands were made to the appellants on 1 August 1997 well within six years prior to the issuance of the writ of summons dated 29 December 1997. Thus, the issue of time bar did not arise (see p 652D).

(4) With regard to the contention that the matter was fully settled, the settlement was strictly between the respondent and the first appellant. The second and third appellants contention that the settlement covered them was without basis. There was also no failure of consideration in the instant case. On the facts, there was no defence on the merits and the appeal should be dismissed with costs (see p 653A–B).

[Bahasa Malaysia summary

Perayu-perayu (defendan-defendan) telah merayu ke Mahkamah Rayuan terhadap keputusan hakim Mahkamah Tinggi yang dalam mengakas keputusan penolong kanan pendaftar, telah menolak permohonan-permohonan perayu-perayu untuk mengenepikan satu penghakiman ingkar ('PI tersebut') yang dimasukkan terhadap mereka oleh responden-responden. Rekod menunjukkan bahawa perayu-perayu pertama dan ketiga telah memfailkan permohonan mereka dua bulan di luar had masa manakala perayu kedua telah melampaui had masa selama tujuh bulan. Tiada apa-apa yang di luar aturan dengan PI tersebut. Peguam perayu-perayu telah mengaku bahawa permohonan-permohonan tersebut adalah di luar had masa tetapi menegaskan bahawa kes mereka mempunyai merit yang menjustifikasikan penepian PI tersebut. Perayu-perayu telah menimbulkan persoalan-persoalan lain seperti: (i) writ yang tidak disampaikan; (ii) had masa; (iii) perkara telah diselesaikan sepenuhnya; dan (iv) kegagalan membuat pertimbangan.

Diputuskan, mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan dengan kos:

(1) Permohonan-permohonan perayu-perayu tidak mematuhi A 42 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980 yang menghendaki satu pihak yang berniat untuk mengenepikan satu penghakiman perlulah membuar permohonan beliau ke mahkamah dan

menyampaikannya ke atas pihak yang memperoleh penghakiman tersebut dalam tempoh 30 hari selepas penerimaan penghakiamn oleh beliau. Berdasarkan fakta-fakta, perayu-perayu pertama dan ketiga melampaui had masa selama dua bulan manakala perayu kedua telah melampaui had masa selama tujuh bulan. Tiada penjelasan diterima daripada perayu-perayu berhubung kelewatan mereka menghadap ke mahkamah dan mereka juga tidak memohon untuk lanjutan masa untuk membuat permohonan-permohonan mereka. Oleh itu adalah jelas tidak perlu bagi merit permohonan-permohonan perayu-perayu dipertimbangkan dan permohonan-permohonan tersebut sepatutnya ditolak in limine (lihat ms 651B–D).

(2) Penyampaian writ ke atas perayu-perayu adalah berikutan satu perintah untuk penyampaian gantian, yang dirujuk disebabkan oleh pertukaran-pertukaran kepada alamat-alamat perayu-perayu tanpa memberitahu reponden. Responden telah mematuhi perintah untuk penyampaian gantian dan perayu-perayu tidak boleh mencabar perintah dalam permohonan-permohonan mereka kerana ia akan membentuk satu serangan kolateral ke atas kesahihan proses yang tidak dibenarkan. Kesahihan perintah untuk penyampaian gantian hanya boleh dicabar jika prosidinga dimulakan untuk tujuan tersebut (lihat ms 651H–I); *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 diikut.

(3) Hujah perayu-perayu berhubung tindakan tersebut di luar had masa telah disalahtanggap. Liabiliti perayu-perayu berasaskan satu 'demand' jaminan dan indemniti. Tuntutan-tuntutan telah dibuat kepada perayu-perayu pada 1 Ogos 1997 sememangnya dalam tempoh enam tahun sebelum pengeluaran writ saman bertarikh 29 Disember 1997. Oleh itu, persoalan tentang had masa tidak timbul (lihat ms 652D).

(4) Berhubung hujah tentang perkara tersebut telah diselesaikan sepenuhnya, penyelesaian tersebut adalah antara responden dan perayu pertama sahaja. Hujah perayu-perayu kedua dan ketiga bahawa penyelesaian tersebut meliputi mereka bertiga tidak berasas. Terdapat kegagalan untuk membuat pertimbangan dalam kes semasa. Berdasarkan fakta-fakta, tiada pembelaan atas merit dan rayuantersebut patut ditolak dengan kos (lihat ms 653A–B).]

Notes

For cases on judgments in default, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3507–3511.

For cases on substituted services, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5328–5346.

Cases referred to

Abdul Latifbin Mohamed Ibrahim v International Factors Leasing Pte Ltd [2001] 2 MLJ 369 (refd)

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (folld)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209 (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155 (refd)

Legislation referred to

Rules of the High Court 1980 O 42 r 13

Lim Chong Leong (*Azam Lim & Pang*) for the appellants.
TY Teh (*TY Teh & Partners*) for the respondent.

Nik Hasim JCA (delivering judgment of the court): In this appeal, the three appellants (the defendants in the court below) appealed against the decision of the learned judge when he reversed the learned senior assistant registrar's decision and hence dismissing the appellants' application to set aside the respondent's ('the plaintiff's') judgment in default ('JID') of appearance entered against the appellants on 21 July 1999.

The appeal was heard and dismissed on 11 September 2003. We now give our reasons.

FACTUAL BACKGROUND

By way of a lease agreement dated 17 January 1983 ('the lease agreement') the respondent as owner of the equipment therein stated leased the same to a company called Joo Fah Huat Sdn Bhd ('the lessee'). The appellants, directors of the lessee, entered into a guarantee and indemnity also dated 17 January 1983 ('the guarantee and indemnity') in favour of the respondent as guarantors to the lessee.

On 1 August 1997, the respondent's solicitors sent their demands to the appellants as the said guarantors. A writ of summons was filed against the appellants on 29 December 1997. On 18 November 1998, an order for substituted service of the writ of summons against the appellants was granted by the court ('the SS order'). On 22 January 1999, upon compliance of the SS order, the respondent filed the affidavit of service and certificate of non-appearance. On 21 July 1999, a JID of appearance was entered against all the three appellants. Then, by the respondent solicitors' letters dated 3 August 1999, the JID was sent to and received by the three appellants. Some two months and seven months thereafter, on the 7 October 1999 in encl 15 and on the 27 March 2000 in encl 21, the first and

A third appellants followed by the second appellant, filed their respective applications to set aside the JID.

THE APPEAL

Learned counsel for the appellants admitted at the outset that the
B appellants' applications to set aside the JID in encll 15 and 21 were filed outside the time allowed. However, he contended that the appellants' case had merits which would justify the setting aside the JID.

From the record, the JID was not irregular in any way. However, the appellants' applications did not comply with O 42 r 13 of the Rules of the
C High Court 1980 which requires that a party intending to set aside a judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the judgment by him. In the present case, the first and third appellants were two months outside the time allowed whereas the second appellant was seven months. Further, there was no explanation whatsoever from the appellants
D for their delay in approaching the court and that they had not prayed for extension of time to make their applications. In these circumstances, there was clearly no need for the merits of the appellants' applications to be considered and in fact they should be dismissed in limine. (see *Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209; *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 ML J 223;
E *Abdul Latifbin Mohamed Ibrahim v International Factors Leasing Pte Ltd* [2001] 2 MLJ 369).

Nevertheless, like the learned judge in the court below, we felt disposed to consider the issues raised by the appellants in support of their applications: (i) non-service of writ (ii) time bar (iii) matter is fully settled,
F and (iv) failure of consideration.

(i) Non-service of writ

We agreed with the learned judge that the service of the writ of summons on the appellants was pursuant to the SS order dated 18 November 1998,
G resort to which was due to the appellants' changes of addresses without informing the plaintiff. The 'new' addresses of the appellants where the judgment were received by them were obtained from IC searches carried out after the JID. The addresses of the appellants where a copy each of the writ of summons was sent were addresses last known and as per the guarantee. It was incumbent on the appellants to inform the respondent of
H any change of the addresses and this, they failed to do. The respondent had complied with the SSorder and the appellants could not now challenge the SS order in their applications for that would amount to a collateral attack on the validity of the process thereto which is not permitted. The validity of the SS order can only be challenged by proceedings instituted for the very purpose. It cannot be challenged collaterally in other proceedings. Peh
I Swee Chin FCJ, delivering the judgment of the then Supreme Court in *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 at p 477 said:

The order of substituted service of the High Court must be obeyed by everyone save in a few and rare exceptions and it can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity save in a very few rare exceptions ...

(ii) Time bar

The appellants' contention on this action being time barred was misconceived as the demands made by the respondent's solicitors were made pursuant to a on 'demand' guarantee and indemnity: see para 1 of the 'Guarantee & Indemnity' at p 0207 of the appeal record. Here the letter of guarantee is very clear. A proper demand was made in accordance with the terms of the 'Guarantee & Indemnity' (see *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155, and therefore, it followed that the appellants' liability to the respondent was founded on the 'on demand' clause under the 'Guarantee & Indemnity', which demands were duly made on them by the respondent's solicitors' letters to them dated 1 August 1997, well within six years prior to the issuance of the writ of summons dated 29 December 1997. Thus, the issue of time bar did not arise.

(iii) Matter is fully settled

We also agreed with the learned judge that the settlement that took place in 1995 was between the respondent and the 1st appellant only over a charge on his land that he created in favour of the respondent in consideration of the loan of RM 100,000.00 given to him. Due to the first appellant's breach under the charge, the respondent commenced foreclosure proceedings against him which prompted the first appellant to subsequently institute an action under Civil Suit No 22–15–1994 at the Temerloh High Court against the respondent alleging non-payment of the sum of RM100,000 under the charge. A settlement was reached between the respondent and the first appellant, represented by the solicitors of Messrs Rosni, Francis Tan & Ho, the terms of which were stated in the documents collectively exhibited as 'RA-1' to encl 16. From the record, the second and third appellants were really strangers to the charge and the settlement. To include the strangers to the settlement would be in violation of the elementary principle of contract. Since the settlement was strictly between the respondent and the first appellant, the second and third appellants' allegation that the settlement did cover them was therefore without basis.

(iv) Failure of consideration

The appellants' contention under this head had no merit. It is clear from exh 'RA-A' to encl 22 at pp 0228–0229 of the appeal record that the lessee company acknowledged receipt of the leased goods. Thus, clearly there was no failure of consideration in this particular case.

A CONCLUSION

The learned judge had considered all the issues raised by the appellants and he was right in his findings. With respect, we agreed with the learned counsel for the respondent that there was no defence on the merits and thereby we dismissed the appeal with costs. The order of the learned judge
B was affirmed. The deposit was ordered to be paid out to the respondent to account of its taxed costs.

My learned brother Augustine Paul JCA and my learned sister Zainun Ali J have seen this judgment in draft and have expressed their concurrence with the reasons herein.

C *Decision of the High Court judge affirmed. Appeal dismissed with costs.*

Reported by Andrew Christopher Simon

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